IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KELLEY MARLOW and AMANDA STEVENS, on behalf of themselves and on behalf of all others similarly situated,	§ § §	
Plaintiffs,	§ §	
vs.	§	**CIVIL ACTION NO. 4:13-CV-00552**
BJ'S RESTAURANTS, INC.,	§ §	
Defendant.	§ § §	

DEFENDANT'S MOTION TO DISMISS, STRIKE COLLECTIVE ACTION CLAIMS AND COMPEL ARBITRATION AND SUPPORTING BRIEF

LITTLER MENDELSON, P.C.
ATTORNEYS FOR DEFENDANT
BJ'S RESTAURANT, INC.

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Defendant BJ's Restaurants, Inc. ("Defendant" or "BJ's"),[1] pursuant to 9 U.S.C. § 3 and Fed. R. Civ. P. 12(b)(6), submits its Motion to Dismiss, Strike Collective Action Claims and Compel Arbitration, requesting that the Court dismiss this suit and compel arbitration on an individualized basis. Plaintiffs Kelley Marlow and Amanda Stephens[2] both signed a Mutually Binding Arbitration Agreement ("Agreement") and explicitly agreed to submit all "disputes which involve or relate in any way to Employee's employment ... to final and binding, private and confidential arbitration." *See* App., pp. 5-6, 8-9.

I. NATURE AND STAGE OF THE PROCEEDING

Plaintiffs' suit was filed on March 1, 2013. Defendant's deadline for filing responsive pleadings was extended by agreement of the parties until April 17, 2013. On that date, the parties again agreed to extend the deadline for filing responsive pleadings until May 1, 2013, to allow Plaintiffs more time to consider whether they would agree to arbitrate the claims raised in this case. This Motion is filed within the agreed-upon deadline for filing responsive pleadings in this case.

II. ISSUE AND STANDARD OF REVIEW

This motion to compel arbitration presents the following issue: Plaintiffs agreed to arbitrate all disputes relating to their employment with Defendant. Plaintiffs have sued Defendant for alleged overtime, minimum wage and record keeping violations under the Fair Labor Standards Act ("FLSA"). These claims are subject to mandatory arbitration. A district court holds no discretion with regard to ordering arbitration. If a matter is arbitrable, the district court must compel arbitration. *Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987).

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[1] Plaintiffs are employed by Chicago Pizza & Brewery, L.P. *See* Declaration of George Perez ("Perez Decl.") ¶ 5 (attached to Appendix ("App")). As such, BJ's Restaurants, Inc. is an improper Defendant and should be dismissed. However, to the extent required by law, BJ's joins in the filing of this Motion. *See Todd v. S.S. Mut. Underwriting Ass'n (Berm. Ltd.),* 601 F. 3d 329, 333-34 (5th Cir. 2010) (third-party beneficiary of arbitration agreement has standing to compel arbitration); *Grigson v. Creative Arts Agency, LLC*, 210 F.3d 524, 527-28 (5th Cir.) (non-signatory may compel arbitration when plaintiff alleges non-signatory engaged in misconduct related to contract), *cert denied*, 531 U.S. 1013 (2000).

[2] Plaintiff Stephens is incorrectly referenced in the case style as "Amanda Stevens." *See* Consent to Become a Party Plaintiff, attached to Plaintiff's Original Complaint Collective Action & Jury Demand ("Complaint") as Ex. "B."

III. SUMMARY OF ARGUMENT

In their Complaint, Plaintiffs allege putative collective action claims for alleged failure to pay overtime and minimum wages and alleged failure to maintain records under the Fair Labor Standards Act ("FLSA"). Complaint ¶¶ 42-52. Plaintiffs are precluded from litigating their claims in Court, however, because they are each party to a valid and enforceable arbitration agreement that requires each of them to arbitrate "all civil claims which relate in any way" to their employment. App., pp. 5, 8.

The United States Supreme Court continues to endorse the enforcement of arbitration agreements, as evidenced by its recent *per curiam* decision in *Nitro-Lift Tech., LLC v. Howard,* 568 U.S. __, 133 S. Ct. 500 (2012) and its decisions in *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740 (2011) ("*Concepcion*") and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1775 (2010) ("*Stolt-Nielsen*"). Consistent with Supreme Court precedent, Plaintiffs must arbitrate their disputes because Defendant can establish what the United States Supreme Court has described as the "gateway issues": the existence of a valid arbitration agreement that covers the parties' disputes. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

As set forth in detail below, the Agreement also requires arbitration of Plaintiffs' claims against Defendant in an individual capacity—not on a collective basis. Therefore, Plaintiffs are precluded from proceeding with a collective action and must arbitrate their claims (if they should so choose) on an individual basis only.

Accordingly, Defendant requests that this Court dismiss this case with prejudice or alternatively stay this case pending arbitration. *See* 9 U.S.C. § 3 (where an issue "referable to arbitration" under a written arbitration agreement is instead brought in court, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement"). In addition, Defendant requests that this Court dismiss the collective action claims and order that any such arbitration proceed on an individual, as opposed to class or collective, basis.

IV. FACTUAL BACKGROUND

A. The Agreement

Each Plaintiff in this case signed an Agreement with BJ's under which both parties agreed to arbitrate any employment-related disputes. App., pp. 3-4, ¶¶ 7-10, and pp. 5-10. The Agreement is the exclusive remedy for resolution of disputes, provides for final and binding arbitration, and precludes an action in court. *Id.* Just above the signature line, the Agreement contains the following notice in all capitals and underlined:

> NOTICE: BY SIGNING THIS AGREEMENT, EMPLOYEE AND THE COMPANY AGREE THAT ALL CLAIMS WILL BE DECIDED BY NEUTRAL ARBITRATION, AND THEY ARE GIVING UP THEIR RIGHT TO A JURY TRIAL OR A COURT TRIAL.

Id., pp. 6, 9.

Moreover, the Agreement makes no reference to any right to bring a collective or class action in arbitration. In fact, the Agreement refers only to the "Company" and the singular "Employee" in describing the parties to the Agreement and types of claims that are subject to arbitration. *See id.*, pp. 5-6, 8-9. Further, in defining "Claims," the Agreement lists, by way of example, only substantive claims ("claims of employment discrimination or harassment ..., claims based on violation of public policy or statutes....") and does not mention procedural devices such as class or collective actions. *See id.* Moreover, nowhere in the Agreement does it state that claims can be brought on behalf of another employee. *See id.*

B. Plaintiffs Agreed to and Acknowledged Their Duty to Arbitrate

In connection with their employment with BJ's, Plaintiffs were expressly made aware of the Agreement and voluntarily signed the Agreement:

1. Plaintiff Kelley Marlow ("Marlow")

Marlow worked for BJ's from October 2011 to October 2012. *Id.*, p. 2, ¶ 5. On October 28, 2011, Marlow signed the Agreement. *Id.*, p. 3, ¶ 7 and pp. 5-6. In addition, on that same date, Marlow signed a personnel file folder containing summaries of several BJ's agreements and policies, including a section entitled Agreement to Arbitrate, which states as follows:

> I understand that as a condition of employment, I have read and signed the Agreement to Arbitrate with BJ's Restaurant, Inc., and a copy will be on record in my employee file at all times. This agreement states that should the need arise all matters will be handled through Arbitration and NOT a court of law.

Id., p. 3, ¶ 8 and p. 7 (emphasis in original).

2. Plaintiff Amanda Stephens ("Stephens")

Stephens began working for BJ's in April 2011 and is still employed by the Company. *Id.*, p. 2, ¶ 5. On April 15, 2011, Stephens also signed the Agreement. *Id.*, p. 3, ¶ 9 and pp. 8-9. In addition, on that same date, Stephens signed the same personnel file folder described above, which included a section entitled Agreement to Arbitrate. *Id.*, pp. 3-4, ¶ 10 and p. 10.

V. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Claims Are Subject to Arbitration Under the FAA

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, was passed to reverse longstanding judicial hostility toward arbitration agreements and to place them upon the same footing as other contracts. *Concepcion*, 131 S. Ct. at 1745. The FAA reflects a "liberal federal policy favoring arbitration" and requires that courts vigorously enforce agreements to arbitrate. *Id.* (internal citations omitted). This "liberal federal policy favoring arbitration agreements" in effect creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the [FAA]." *Perry v. Thomas*, 482 U.S. 483, 489 (1987). Accordingly, it is the intent of Congress "to move the parties to an arbitrable dispute out of court and into arbitration ***as quickly and easily as possible***." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (emphasis added).

"[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25. Indeed, the Court must defer to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" and all "doubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). By its terms, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Accordingly, this Court must resolve any doubts regarding the scope and enforceability of the Agreement in favor of arbitration.

The FAA applies to agreements "involving" commerce. 9 U.S.C. § 2. The Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). Here, the Agreement expressly states that it is governed by the FAA. App., pp. 5, 8. Moreover, BJ's operates restaurants throughout the United States. BJ's purchases its inventory and equipment from domestic and/or overseas manufacturers, suppliers, and/or distributors, and such inventory and equipment is transported across state lines for delivery to BJ's restaurants. *Id.*, p. 2, ¶ 4. Accordingly, there can be no legitimate question that the Agreement is governed by the FAA.

Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the FAA preempts all otherwise applicable or conflicting state laws. *Preston v. Ferrer*, 552 U.S. 346, 356-57 (2008); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Arbitration agreements governed by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Perry,* 482 U.S. at 492 n. 9. The creation of a defense specifically applicable to arbitration agreements thus violates the FAA. 9 U.S.C. § 2; *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Southland Corp.*, 465 U.S. at 10. Therefore, states, whether through their legislatures or courts, cannot create special exceptions to the enforcement of arbitration agreements governed by the FAA. *See Preston*, 552 U.S. at 356-57.

In keeping with the "liberal federal policy favoring arbitration," the Supreme Court has consistently endorsed arbitration as an effective means of dispute resolution in employment cases and has upheld such arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (arbitration agreement enforced when employee was required to sign agreement during application process); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing agreement to arbitrate employment-related claims contained in securities representative registration that plaintiff was required to sign); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477 (1989) (arbitration agreement enforced despite parties' alleged unequal bargaining power). If an arbitration agreement exists, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration . . . [.]" *Dean Witter Reynolds,* 470 U.S. at 218.

Significantly, the party resisting arbitration bears the burden of proving a legislative intent to preclude arbitration of the claims asserted. *Gilmer*, 500 U.S. at 26.

Moreover, there is no question that an employer and employee can agree to arbitrate claims arising under the FLSA. *See, e.g., Carter v. Countrywide Credit Indus.,* 362 F.3d 294, 298 (5th Cir. 2004) (rejecting claim that inability to proceed collectively deprived plaintiffs of substantive rights available under FLSA); *Lim v. Offshore Specialty Fabricators, Inc.,* 404 F.3d 898, 905-06 (5th Cir.) (holding that FLSA claims are arbitrable), *cert denied*, 531 U.S. 1013 (2005). Accordingly, Plaintiffs' FLSA claims are subject to arbitration.

B. The Agreement is Valid Under Texas Law

To determine whether the parties entered into a valid and enforceable arbitration agreement, the agreement must be examined under Texas law regarding contract formation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate." *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 738 (Tex. 2005).

In Texas, an employer may change the terms of an at-will employment contract to include an agreement to arbitrate, if the employer proves two things: "(1) notice of the change, and (2) acceptance of the change." *In re Halliburton Co.,* 80 S.W.3d 566, 568 (Tex. 2002) (citing *Hathaway v. Gen. Mills, Inc.,* 711 S.W.2d 227, 229 (Tex. 1986), *cert. denied*, 537 U.S. 1112 (2003)). To establish notice, an employer "'must prove that he unequivocally notified the employee of definite changes in employment terms.'" *Id.* (quoting *Hathaway*, 711 S.W.2d at 229). Continued employment thereafter constitutes acceptance of the changes. *Id.* In *Halliburton*, the court held that the employer proved both notice and acceptance through evidence that the company sent notice to all employees that it was adopting an arbitration agreement, and informed employees that by continuing to work after a certain date, they would be accepting the new agreement. *Id.* at 569-70; *see also Johnson v. Coca-Cola Refreshments USA, Inc.,* 2012 U.S. Dist. LEXIS 26994 (E.D. Tex. Feb. 3, 2012)[3] (holding that employee was bound by arbitration agreement after attending orientation session where arbitration agreement was discussed and materials passed out).

In this case, Plaintiffs received unequivocal notice of the Agreement, as evidenced by their signatures on their respective Agreements. Moreover, Plaintiffs were notified that the agreement to arbitrate was a "condition of [their] employment." *See* App., pp. 7, 10. In short, the Agreement sets forth clear, definite terms, which were communicated to Plaintiffs in writing. As such, the notice requirement for contract enforceability in Texas has been met.

Plaintiffs accepted the terms of the Agreement in two ways. First, they each signed the Agreement itself, as well as a summary on their personnel files affirming their understanding that their agreement to arbitrate was a condition of their employment. ***This, taken alone, is enough to compel arbitration of this matter.*** *See In re McKinney,* 167 S.W.3d 833, 835 (Tex. 2005) ("absent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract he signed, regardless of whether he read it or thought it had different terms") (citing *EZ Pawn Corp. v. Mancias,* 934 S.W.2d 87, 90 (Tex. 1996)); *see also Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 146 (Tex. App.--Houston [1st Dist.] 1986, no writ) (one who signs contract "must be held to have known what words were used in the contract and to have known their meaning, and he must also be held to have known and fully comprehended the legal effect of the contract.").

Second, Plaintiffs continued their employment after receiving a copy of the Agreement. By continuing to work for an employer after receiving notice of an arbitration policy, an employee accepts the agreement to arbitrate as a matter of law. *Halliburton*, 80 S.W.3d at 569; *May v. Higbee Co*., 372 F.3d 757, 764 (5th Cir. 2004); *In re Dallas Peterbilt*, 196 S.W.3d 161, 162-63 (Tex. 2006). Courts are legion in adopting this principle. *See In re Dillard Dep't Stores*, 198 S.W.3d 778, 780-81 (Tex. 2006) (acceptance found when employee received, but did not sign, summary of arbitration policy and continued working past its effective date); *Johnson*, 2012 U.S. Dist. LEXIS 26994 at *11 ("After notice, Plaintiff continued to work for Defendant, which indicates his acceptance of the change in his employment relationship and indicates his agreement to be bound by [the arbitration agreement]."); *Burton v. Citigroup*, 2004 U.S. Dist. LEXIS 10627, *12 (N.D. Tex June 9, 2004) ("whether plaintiff signed any particular document is irrelevant . . . [plaintiff] manifested her acceptance as a matter of law by continuing to work for [defendant] after notification that the arbitration policy would be implemented."); *Jones v. Fujitsu Network Comm., Inc*., 81 F.Supp.2d 688, 692 (N.D. Tex. 1999) (if employee continues working for employer with knowledge of arbitration policy, employee "accept[s] the arbitration policy as a matter of law").[4] As such, Plaintiffs both "manifested an intention to be bound" by the Agreement.

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[3] This case, and all other authorities not readily available in written sources, are included in the Appendix hereto.

The Agreement also meets the requirement of Texas contract law that it be supported by consideration. Both Plaintiffs and Defendant manifested a mutual intention to be bound by the Agreement. The Agreement specifically states "Employee ***and*** Company agree to submit ... claims or controversies relating to Employee's employment to final and binding arbitration ...." *See* App., pp. 5, 8. It is well established law in Texas that mutual agreements to arbitrate disputes constitute adequate consideration for an arbitration agreement. *See In re Odyssey Healthcare, Inc*., 310 S.W.3d 419, 424 (Tex.), *cert. denied*, 131 S. Ct. 319 (2010); *J.M.*

[4] This is true even if Plaintiffs do not recall the agreement. *See Johnson,* 2012 U.S. Dist. LEXIS 26994 at *10 ("The fact that Plaintiff asserts that he does not recall any discussion about binding arbitration of legal disputes does not invalidate the agreement between the parties.") (citing *Jones,* 81 F. Supp. 2d at 688).

Davidson, Inc. v. Webster, 128 S.W.3d 223, 228 (Tex. 2003). Thus, all of the elements necessary for a valid contract are met.

C. Plaintiffs' FLSA Claims Fall Within the Scope of the Agreement

There can be no dispute that the Agreement covers Plaintiffs' FLSA claims. The Agreement covers "all civil claims which relate in any way to Employee's employment with the Company including, but not limited to, ... claims based on violation of public policy or statute." App., pp. 5, 8. As FLSA claims are unquestionably "claims based on violation of ... statute" that "relate in any way" to Plaintiffs' employment, the claims asserted in this lawsuit are covered by the Agreement.

D. Controlling United States Supreme Court Authority Mandates That Arbitration Proceed As an Individual Action, Rather Than a Class or Collective Action

As the Supreme Court recently confirmed in *Stolt-Nielsen,* 130 S. Ct. at 1764, 1775, it is improper to force a party into a class proceeding to which it did not agree, because arbitration "is a matter of consent." As such, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis original). In *Stolt-Nielsen*, the Court held that an arbitration panel exceeded its authority by ordering the parties to proceed with class arbitration when the arbitration agreement was silent as to whether class actions should be allowed. *Id.* As in *Stolt-Nielsen*, there can be no question that the parties in this case did not agree to class or collective arbitration.

1. The Agreement Is Silent with Respect to the Issue of Class Arbitration; Thus *Stolt-Nielsen* and *Concepcion* Compel Individual Arbitration

The Agreement is silent with respect to class or collective arbitration. When an arbitration agreement is "silent" on the issue of class arbitration, it ***cannot*** "be interpreted to allow them because the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Concepcion*, 131 S. Ct. at 1750 (citing *Stolt-Nielsen*, 130 S. Ct. at 1776).

In *Stolt-Nielson*, the Court set forth the "standard to be applied by a decision maker in determining whether a contract may permissibly be interpreted to allow class arbitration." 130 S. Ct. at 1772. The Court held that "a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id*. at 1775 (emphasis in original). As the Court made clear in *Stolt-Nielsen*, "the parties' mere silence on the issue of class arbitration" does not "constitute[] consent to resolve their disputes in class proceedings." *Id.* at 1776.

The Fifth Circuit recently relied upon *Stolt-Nielson* to conclude that an arbitrator exceeded his authority by ordering class arbitration. In *Reed v. Fla. Metro. Univ.,* 681 F.3d 630, 642 (5th Cir. 2012), the arbitration agreement at issue "fail[ed] to address class arbitration" and the parties "did not discuss whether class arbitration was authorized." Given these facts, the Fifth Circuit held:

> [T]he arbitrator lacked a contractual basis upon which to conclude that the parties agreed to authorize class arbitration. At most, the agreement in this case could support a finding that the parties did not preclude class arbitration, but under *Stolt-Nielsen* this is not enough. The arbitrator therefore exceeded his authority in ordering the parties to submit to a class arbitration proceeding, and the district court should have vacated the award. 9 U.S.C. § 10(a)(4); *see Stolt-Nielsen*, 130 S. Ct. at 1776.

Reed, 681 F.3d at 644.[5]

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[5] Defendant anticipates that Plaintiffs may cite *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir.), *cert. granted*, 133 S. Ct. 786 (2012) and *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), as holding to the contrary. However, the *Sutter* case is on appeal and pending before the U.S. Supreme Court, thus weakening any precedential value it may have. Moreover, neither *Sutter* nor *Jock* is controlling authority in this Circuit, and both cases are distinguishable on a critical point. In both cases, the courts viewed their role as being extremely limited, given the FAA's deferential standard of review. *See Jock*, 646 F.3d at

Similarly, in *DIRECTV, LLC v. Arndt*, 2012 U.S. Dist. LEXIS 185158 (N.D. Ga. Nov. 30, 2012), the court vacated an arbitrator's clause construction award because the arbitration agreement contained no indication that the parties had agreed to class arbitration. In that case, the arbitrator reasoned that, because the parties had agreed to arbitrate FLSA claims, they must have agreed to resolution of those claims through collective action because the agreement said that the claimants would have the same rights in arbitration that they would have in a civil action. *Id*. at *12. Disagreeing, the court stated that the arbitrator's analysis "completely turns *Stolt-Nielsen* on its head. The primary holding of *Stolt-Nielsen* is that when an agreement is silent as to the applicability of class arbitration ... consent to class arbitration cannot be presumed from that silence." *Id*. at **12-13; *see also Fitzhugh v. Am. Income Life Ins. Co.*, 2011 U.S. Dist. LEXIS 156855, **15-16 (N.D. Ohio Nov. 3, 2011) (relying upon *Concepcion* to compel arbitration of individual FLSA claims and dismiss class claims when arbitration agreement was silent on question of class or collective arbitration); *Goodale v. George S. May Int'l Co.*, 2011 U.S. Dist. LEXIS 37111 (N.D. Ill. Apr. 5, 2011) (in case involving arbitration agreement containing no express class action waiver, court held that *Stolt-Nielson* ***"forecloses the possibility that the class claims are arbitrable"*** and that arbitration should proceed only with respect to plaintiff's individual claims) (emphasis added).

As in *Reed* and the other cases cited above, the Agreement does not address class arbitration – let alone contain an agreement *authorizing* class arbitration. At most, it can be

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121-22; *Sutter*, 675 F.3d at 219. The *Jock* court expressly stated that its review was limited solely to whether the arbitrator "had the authority to make the decision," and "not whether the arbitrator was right or wrong in her analysis." 646 F.3d at 127; *see Sutter*, 675 F.3d at 224-25 (finding that "the arbitrator endeavored to interpret the parties' agreement within the bounds of the law, and we cannot say that his interpretation was totally irrational. Nothing more is required under § 10(a)(4) of the Federal Arbitration Act"). Thus, neither of those cases reached a decision as to whether the agreements involved, in fact, provided a contractual basis for concluding that the parties had agreed to arbitrate on a class basis. Rather, they merely concluded, under the deferential standard required by the FAA for review of arbitration awards, that the arbitrators in those cases did not exceed their broad authority to determine the issue of class arbitration.

argued that the Agreement does not expressly preclude it. However, as *Stolt-Nielsen* made clear, the absence of an express class action waiver is not enough to find that the parties *agreed* to class arbitration. 130 S. Ct. at 1776. *Concepcion* and *Stolt-Nielsen*, taken together, stand squarely for the proposition that parties ***cannot*** be forced to arbitrate disputes in a collective or class action unless the parties agree to collective or class action arbitration. *See Concepcion*, 131 S. Ct. at 1750-51 ("class arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with the FAA"); *Stolt-Nielsen,* 130 S. Ct. at 1775 ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.").

In summary, given the Agreement's silence with respect to class or collective arbitration, Supreme Court precedent dictates that there can be no class or collective arbitration.

2. The Agreement Contains No Implicit Agreement to Arbitrate As a Class, and, In Fact, Strongly Infers That Only Individual Arbitration Is Contemplated

Defendant anticipates that Plaintiffs will argue that the Agreement contains an implicit agreement to arbitrate as a class or collectively. However, the *Stolt-Nielsen* Court made very clear that "[a]n implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." 130 S. Ct. at 1775. As the Court went on to explain, this is so "because class-action arbitration changes the nature of the arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* As such, Plaintiffs cannot show that the parties intended to arbitrate on a class or collective action basis merely because the Agreement requires arbitration of FLSA claims.

As the Court made clear in *Stolt-Nielsen,* an agreement to allow class arbitration may not be lightly inferred. 130 S. Ct. at 1776; *see Reed*, 681 F.3d at 640. There is simply no indication in the Agreement that the parties intended – either explicitly or implicitly – to allow class or collective arbitration. To the contrary, there is ample evidence within the Agreement that the parties contemplated ***individual arbitration*** and ***not*** class arbitration. The Agreement's express purpose is "to obtain a ruling on future disputes ***without the costly expense and lengthy delays*** typically associated with court actions." App., pp. 5, 8 (emphasis added). As the Court noted in *Concepcion*, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[6] 131 S. Ct. at 1751. As such, the express intent of the Agreement is inconsistent with class-wide arbitration.

In addition, the Agreement expressly states that its proceedings are to be "private and confidential." *See* App. pp. 5, 8. This provision is also at odds with class-wide arbitration. *See Stolt-Nielson,* 130 S. Ct. at 1776. Further, in defining "Claims," the Agreement lists, by way of example, only substantive claims, "including, but not limited to, arbitrable claims of employment discrimination or harassment ... claims based on violation of public policy or statute...," and does not mention procedural devices such as class or collective actions.[7] *See* App., pp. 5, 8.

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[6] The *Concepcion* Court also discussed the fact that class arbitration requires procedural formality, and the Court stated that it was unlikely Congress meant to leave the disposition of those procedural requirements to an arbitrator. 131 S. Ct. at 1751-52. Finally, the Court opined that arbitration was poorly suited to the higher stakes of class litigation and greatly increased the risks to the defendant, particularly given the absence of multilayered judicial review. *Id.* at 1752.

[7] Federal court decisions have made clear that the FLSA's collective action provision is not a substantive right, but a procedural device that can be waived. *Owen v. Bristol Care, Inc.*, 702 F. 3d 1050, 1052-53 (8th Cir. 2013) (rejecting plaintiffs' argument that Section 216(b) of FLSA creates non-waivable substantive right to bring collective action); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (rejecting argument that inability to proceed collectively deprived plaintiffs of substantive rights under FLSA); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (noting that FLSA collective action was not a "non-waivable right"); *Horenstein v. Mortg. Mkts., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001) ("Although plaintiffs who signed arbitration agreements [containing class waivers] lack the *procedural* right to proceed as a class, they nevertheless retain all *substantive* rights under [the FLSA]") (emphasis added). *See also LaVoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277, *20 (S.D.N.Y. Jan. 13, 2012) (rejecting argument that FLSA guarantees right to bring collective action); *Lu v. AT&T Servs.*, 2011 U.S. Dist. LEXIS 65617, **8-9 (N.D. Cal. June 21, 2011) (holding that "right to bring a collective action under the FLSA is a procedural—not a substantive one"); *Winn v. Tenet Healthcare Corp*, 2011 U.S. Dist. LEXIS 8085, *30 (W.D. Tenn. Jan. 27, 2011) ("the 'mere fact that class actions are mentioned within § 216(b) does not create a "right" for a plaintiff to bring a class action'"); *Zekri v. Macy's Retail Holdings,*

Moreover, nowhere in the Agreement does it state that claims can be brought on behalf of another employee.

Finally, the language of the Agreement clearly contemplates individual, rather than collective or class-wide, arbitration: the Agreement is between the Company and "***Employee***" in the singular; the Agreement covers claims that relate in any way to "***Employee's***" employment; and the Agreement contemplates claims "initiated by ***Employee*** or by the Company." *Id.* (emphasis added).

In interpreting an agreement very similar to the Agreement at issue here, a California Court of Appeals relied upon *Concepcion* and *Stolt-Nielsen* to overturn the lower court's denial of the defendant's motion to dismiss class allegations. In *Kinecta Alt. Fin. Solutions v. Superior Court,* 2012 Cal. App. LEXIS 487 (Cal. App. 2d Dist., April 25, 2012), the court found that the language of the arbitration agreement contemplated disputes between only two parties – the defendant and the plaintiff. *Id.* The court concluded that the lower court's order compelling arbitration but denying the motion to dismiss class allegations "imposed class arbitration even though the arbitration provision was limited to the arbitration of disputes between [the plaintiff and defendant]." *Id.* As such, relying upon *Stolt-Nielson* and *Concepcion*, the court reversed the order of the trial court denying the defendant's request to dismiss class claims from the complaint. *See also Goodale*, 2011 U.S. Dist. LEXIS 37111 (in case involving arbitration agreement containing no express class action waiver, court held that *Stolt-Nielson* ***"forecloses the possibility that the class claims are arbitrable"*** and that arbitration should proceed only with respect to plaintiff's individual claims) (emphasis added).

Inc., 2010 U.S. Dist. LEXIS 119453, *4, 8 (N.D. Ga. Nov. 4, 2010) (rejecting notion that right to bring collective action under FLSA is substantive right that cannot be waived and compelling arbitration on individual basis).

In summary, the Agreement contains no "implicit" agreement to arbitrate on a collective or class action basis. To the contrary, the language of the Agreement shows that the parties did ***not*** intend to arbitrate collectively or as a class. Because parties ***cannot*** be forced to arbitrate disputes in a class action unless the parties agreed to class action arbitration (*see Concepcion*, 131 S. Ct. at 1750-51; *Stolt-Nielsen,* 130 S. Ct. at 1775), the Court should compel arbitration on an individual basis only, dismissing Plaintiffs' collective claims. *See* 9 U.S.C. § 4 (courts must compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement); *see also Fitzhugh v. Am. Income Life Ins. Co.,* 2011 U.S. Dist. LEXIS 156855 (N.D. Ohio Nov. 3, 2011) (relying upon *Concepcion* to compel arbitration of individual FLSA claims and dismiss class claims when arbitration agreement was silent on question of class or collective arbitration).

3. The Court Has Authority to Decide Whether Arbitration Should Proceed as a Class or Collective Action

It is within this Court's authority to decide that the arbitration shall not proceed as a class or collective action. Plaintiffs may argue that the issue of whether collective arbitration can be compelled is for the arbitrator and not the Court to decide, relying upon *Reed v. Fla. Metro. Univ., Inc*., 681 F.3d 630 (5th Cir. 2012). In *Reed*, the court held that the district court properly referred that issue to the arbitrator because the agreement in that case provided that the American Arbitration Association's ("AAA") rules would apply. *Id.* at 635-36. The AAA's Supplementary Rules for Class Arbitration ("AAA Class Rules") provide that the arbitrator "shall determine as a threshold matter ... whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class ...." AAA Class Rule 3.[8] Thus, the *Reed* court reasoned that the parties' consent to the AAA rules constituted "a clear agreement to allow

8 The AAA and JAMS rules referenced herein are included in the App. at pp. 76-86.

the arbitrator to decide whether the party's agreement provides for class arbitration." 681 F.3d at 635-36.

In this case, the Agreement is governed by the JAMS Employment Arbitration Rules. *See* App., pp. 5, 8. Although the JAMS Class Action Procedures ("JAMS Class Rules")[9] also provide that the arbitrator shall decide whether the arbitration can proceed as a class (*see* JAMS Class Rule 2), there are significant differences in the JAMS Class Rules and the AAA Class Rules that make the *Reed* case inapplicable. JAMS Class Rule 1 states that "JAMS will not administer a demand for class action arbitration when the underlying agreement contains a class preclusion clause, ***or its equivalent***, unless ***a court orders*** the matter or claim to arbitration as a class action." *Id.* (emphasis added). As set forth above, the Agreement's silence with respect to class or collective arbitration is the equivalent of a class preclusion clause under the *Stolt-Nielsen* and *Reed* decisions. *See Quilloin v. Tenet Healthsystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3rd Cir. 2012) ("silence regarding class arbitration generally indicates a prohibition against class arbitration") (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).[10]

Thus, because the Agreement contains what amounts to the equivalent of a class preclusion clause, the JAMS Class Rules clearly contemplate that the Court will decide the issue of whether arbitration should proceed as a class or collective action. As set forth above, JAMS Class Rule 1 states that JAMS will only administer a demand for class action arbitration under these circumstances if a *court* orders class or collective arbitration. *Id.* (emphasis added). Similarly, JAMS Class Rule 2 states as follows: "the Arbitrator, following the law applicable to

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9 The JAMS Class Rules provide that they "shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the JAMS Arbitration Rules where a party submits a dispute to arbitration on behalf of or against a class or purported class." JAMS Class Rule 1(b).

10 The Third Circuit in *Quilloin* noted that the determination of "whether class action is prohibited is a question of interpretation and procedure for the arbitrator." 673 F.3d at 232 (citing *Stolt-Nielsen*, 130 S. Ct. at 1775). However, the Fifth Circuit in *Reed* disagreed, holding that the question as to whether the arbitrator or court should determine if the parties' arbitration agreement allowed for class arbitration "remains open." 681 F.3d at 634.

the validity of the arbitration clause as a whole or the validity of any of its terms, ***or any court order applicable to the matter***, shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class." *Id.* (emphasis added).[11] Thus, the JAMS Class Rules clearly contemplate that the Court will address the issue of class or collective arbitration when the agreement contains either a class action waiver or its "equivalent," and that the arbitrator is bound by that decision.

VI. CONCLUSION AND REQUEST FOR RELIEF

When a court determines that all of a plaintiff's claims are subject to arbitration, the complaint should be dismissed. *See Alford v. Dean Witter Reynolds, Inc.,* 975 F.2d 1161, 1164 (5th Cir. 1992). As the Fifth Circuit instructed in *Alford*:

> [W]e do not believe the proper course is to stay the action pending arbitration. Given our ruling that all issues raised in this action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose. Any post-arbitration remedies sought by the parties will not entail renewed considerations and adjudication of the merits of the controversy but would be circumscribed to a judicial review of the arbitrator's award in the limited manner prescribed by law.

Id. See Fedmet Corp. v. M/V Buyalyk, 194 F.3d 674 (5th Cir. 1999); *see also Marsh v. First USA Bank, N.A.,* 103 F. Supp.2d 909, 926 (N.D. Tex. 2000) (explaining that, although 9 U.S.C. § 3 requires court to stay proceedings if it decides that claims are arbitrable, stay requirement does not preclude dismissal of case if court concludes that all claims are subject to arbitration).

Accordingly, Defendant request that this Court strike class claims, compel arbitration in accordance with the terms of the Agreement, including those terms precluding class arbitration, and dismiss this proceeding, with prejudice to re-filing the same. In the alternative, should the

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[11] This is very different language from AAA Class Rule 3, which makes no mention of the Arbitrator following any specific law or court order.

Court deem dismissal improper, Defendant requests that this action be stayed pending completion of binding arbitration. *See* 9 U.S.C. § 3.[12]

Dated April 30, 2013

Respectfully submitted,

/s/ Vicki L. Gillette

Robert F. Friedman (Attorney-in-Charge)
State Bar No. 24007207
Southern District Bar No. 38262
Vicki L. Gillette
State Bar No. 08957325
Southern District Bar No. 14539

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, TX 75201-2931
214.880.8100
214.880.0181 (Facsimile)
rfriedman@littler.com
vgillette@littler.com

and,

David B. Jordan
State Bar No. 24032603

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
1301 McKinney Street, Suite 1900
Houston, TX 77010
713.951.9400
713.951.9212 (Facsimile)
djordan@littler.com

ATTORNEYS FOR DEFENDANT
BJ'S RESTAURANT, INC.

[12] Indeed, the FAA's stay provision is *mandatory,* and, if the issues in the case are within the scope of the arbitration agreement, the district court has no discretion to deny the stay. *See Gutierrez v. Acad. Corp.*, 967 F. Supp. 945, 947 (S.D. Tex. 1997); *In re J.D. Edwards World Solutions Co*, 87 S.W.3d 546, 549 (Tex. 2002) ("If the arbitration agreement encompasses the claim at issue and there are no defenses to enforcement of the arbitration agreement itself, the trial court has no discretion but to compel arbitration and stay its own proceedings.").

CERTIFICATE OF SERVICE

On April 30, 2013, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Southern District of Texas, using the Case Management/Electronic Case Filing System (CM/ECF). I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Vicki L. Gillette
Vicki L. Gillette